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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 5031

HYMAN WINTER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS
Counsel for Petitioner
66 Court Street
Brooklyn, N. Y.

JEROME LEWIS
THOMAS R. NEWMAN
of Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1965

HYMAN WINTER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Hyman Winter, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 2, 1965, which unanimously affirmed the judgment of conviction entered in the United States District Court for the Eastern District of New York on January 29, 1965.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported. The decision of said court denying petitioner's petition for rehearing (Appendix B) is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 2, 1965. A timely petition for rehearing was thereupon filed with said court on July 15, 1965, and was denied on August 2, 1965.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether it is not incumbent upon the Government, once its investigation has passed beyond the general inquiry stage into the accusatory stage by focusing upon a particular individual, to advise that individual of his constitutional right to counsel, and to afford him the opportunity to consult counsel, before subjecting him to any type of interrogation aimed at eliciting incriminating statements?

2. Whether the failure to advise a prospective defendant of his constitutional right to counsel prior to the commencement of his interrogation before a grand jury does not so taint the entire proceeding that the Government is constitutionally prohibited from using against said defendant, in any manner, any statement thereafter elicited from him?

3. Where, during interrogation by the prosecutor a prospective defendant has unequivocally denied committing a particular crime, and the Government has independent evidence sufficient to indict the defendant for said crime, is it not violative of the defendant's Fifth Amendment rights, and fundamentally unfair, for the Government to compel said defendant to appear before a grand jury, take an oath and submit to questioning which the prosecutor knows will elicit answers that would either be used to secure the defendant's conviction for the crime being investigated or would form the basis for a perjury indictment?

Statement

On May 8, 1963, petitioner, a Federal Housing Administration construction supervisor, was subpoenaed to appear before a Federal grand jury which was conducting an investigation into alleged bribery, graft and other illegal practices in the building industry in the Eastern District of New York (A11a, A21a).* Ostensibly, petitioner was to attend and act as a witness for the Government (A21a). His immediate superior told him that he would be considered "on actual leave" and would be paid for his time by the FHA (A21a).

Complying with the subpoena, petitioner appeared at the office of Assistant United States Attorney Grunewald, where he was asked whether he had ever taken or accepted a bribe from any builder (A22a, A27a). Petitioner replied that he had not, that he "never took a crooked penny in my life" (A29a). After further questioning, the prosecutor presented petitioner with a "waiver of immunity", which petitioner signed although told he need not do so (A22a). Petitioner was then told that he would be called into the grand jury room where he would again be asked whether he had ever accepted a bribe (A22a, A29a).

The prosecutor never informed petitioner that, as a prospective defendant, he had the right to consult with counsel before submitting to interrogation, that counsel could be present during any interrogation in the prosecutor's office, and that counsel could be available outside the grand jury room to advise petitioner should any questions

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* References in parentheses preceded by the letter "A" are to pages of Appellant's Appendix filed with the United States Court of Appeals for the Second Circuit.

occur to him during the course of his interrogation before that body. This is undisputed.

Unknown to petitioner, the grand jury's investigation had been in progress for approximately six months prior to the date of his appearance before that body (A12a). During that period approximately 50 builders had appeared before the grand jury and each had been asked whether he knew petitioner and had ever given him any money (A12a-13a). Six of the builders testified that they had given petitioner small sums of money, not as a bribe, but merely as a gift or gratuity (A13a-17a). The last of these six witnesses appeared before the grand jury on April 24, 1963.

When petitioner walked into the grand jury room on May 8, 1963, therefore, the grand jury had already heard sufficient testimony from the aforesaid builders to enable it to report out a bribery indictment against petitioner. Such an indictment was, in fact, returned on June 26, 1963, charging petitioner with 15 counts of bribery in violation of Title 18, U.S.C. § 202, which counts alleged his acceptance of certain sums of money from the above mentioned six builders.

At the outset of his interrogation, petitioner was told by the foreman of the grand jury that he was the "subject" of the investigation then in progress and a "prospective defendant" (A13a, A31a). He was further advised that anything he said could be used against him and that he could assert his Fifth Amendment rights and refuse to testify as to any matters which might tend to incriminate him (A31a-32a).

At no time, however, was petitioner informed of his right to consult with counsel, or told that at least six builders

had already testified before the grand jury to giving petitioner money (A14a-15a, A23a). The failure to so advise petitioner was crucial since the prosecutor must have known that once petitioner took the oath, whatever answer he gave to the questions which would again be put to him would be incriminating. If petitioner admitted the receipt of money it would aid the Government in securing his conviction for bribery; on the other hand, if he persisted in his denial, it would result in his indictment and prosecution for perjury.

On June 26, 1963, the grand jury reported out indictment 63 Cr. 265, charging petitioner with bribery, as aforesaid, and, at the same time, reported the instant indictment 63 Cr. 266, charging petitioner with perjury. The specific question which petitioner was alleged to have answered untruthfully in count 5 of the instant indictment,* and for which he now stands convicted, is as follows (A10a):

> "Q. Is it your testimony, then, that you have never taken money at any time from any builder for any reason whatsoever? A. That is correct, sir."

The Government elected to proceed to trial on the perjury indictment and has not proceeded with the bribery indictment (A23a-24a); obviously, because the Government's witnesses insisted that they did not give petitioner money with the intent to influence his official actions thereby, but merely as a gratuity or gift (see, *e.g.*, A15a-17a).

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* Counts 2, 3 and 4 were dismissed as duplicitous at the end of the Government's case and count 1 was dismissed at the end of the entire case.

REASONS FOR GRANTING THE WRIT

1. This Court's constant expansion and development of the right to counsel, and its recognition that our adversary system of criminal justice can only survive in its present form if an accused is made aware of his rights and given the opportunity to avail himself of the "guiding hand of counsel" at a stage in the proceedings when counsel can still be of realistic assistance, logically led to its decision in *Escobedo* v. *Illinois*, 378 U.S. 478.

During the year since that decision was rendered, courts, both Federal and State, have been confronted with the two-fold problem of discerning what generally applicable underlying principles are to be taken from *Escobedo*, and then applying these principles to a variety of differing factual situations. Judging from the conflicting decisions which have resulted, and from the sharp division in almost every court which has considered these questions, the *Escobedo* decision appears to have taken on a Delphic quality. Further guidance from this Court seems imperative.

As we read it, however, the teaching of *Escobedo* is clear and simple enough: ". . . when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer" (378 U.S. 478, 492). Further clarification of this is found in Mr. Justice White's dissenting opinion (378 U.S. 478, 495-496), where he concludes that: "At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made

to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. * * * The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become a suspect."

The problem, as we view it, has been the attempt by many courts to limit the effect of *Escobedo* to its precise fact pattern. Thus, they seize upon the words "under the circumstances here" and completely disregard the fact that the decision is but the logical extension of a line of reasoning; that the general principles enunciated therein, and which gave rise to it, transcend the particular fact pattern.

Undoubtedly, the attempt by many courts to narrowly proscribe the right to counsel stems from their belief that the preservation of cherished individual rights must yield to the supposed needs of law enforcement agencies. This very argument, however, was considered and rejected as unsubstantial in *Escobedo*. Thus, the opinion of the Court clearly states (378 U.S. 478, 488, 490):

> "The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.
>
> * * * * *

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

Unfortunately, many courts have taken it upon themselves to consider anew the priority to be accorded these competing interests. In many cases they have differed from this Court and have struck the balance in favor of more effective law enforcement at the cost of the individual's rights. At present, therefore, the right to counsel, although guaranteed to every citizen of these United States by the Sixth Amendment to our Federal Constitution, takes on a different meaning depending upon which State or Federal Circuit one happens to be in. Such a situation is intolerable.

Thus, the highest courts of California (*People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361), Oregon (*State* v. *Neely*, 395 P. 2d 557) and Rhode Island (*State* v. *Mendes*, 210 A. 2d 50) have rejected the suggestion that an accused's right to counsel depends upon a specific request, and have held that "the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached" (*People* v. *Dorado, supra*). A similar position was taken by the Court of Appeals for the Third Circuit (*United States ex rel. Russo* v. *State*, F. 2d , 33 U.S.L.W. 2621), which noted that:

> "The request by Escobedo to consult with his attorney is in and of itself evidence that he was aware of his constitutional rights. Thus, it would seem that to suppress a confession of one knowledgeable of his rights but who has nonetheless confessed and to admit into evidence a confession of one who might be unaware of his rights at the time of his confession would be sophistry."

Nevertheless, New York (*People* v. *Gunner,* 15 N.Y. 2d 226, 257 N.Y.S. 2d 924), Massachusetts (*Commonwealth* v. *Tracy,* 207 N.E. 2d 16), Pennsylvania (*Commonwealth ex rel. Linde* v. *Maroney,* 416 Pa. 331, 206 A. 2d 288) and Illinois (*People* v. *Hartgraves,* 31 Ill. 2d 375, 202 N.E. 2d 33, cert. den. 380 U.S. 961) have taken the position that there is no obligation on the part of the prosecutor or police to advise an accused of his right to counsel and that the failure to do so does not render inadmissible any subsequently obtained incriminating statement.

A similar division of authority is found in the Federal courts. Thus, while, as noted, the Court of Appeals for the Third Circuit has held that "the right to counsel at the interrogation stage does not depend on a request by the person interrogated" (*United States ex rel. Russo* v. *State, supra*), the Court of Appeals for the Seventh Circuit (*United States* v. *Childress,* F. 2d , 34 U.S.L.W. 2004) has refused to apply *Escobedo* in the absence of such a request. The sharp division within the Court of Appeals for the District of Columbia Circuit appears from their decision in *Jones* v. *United States,* 342 F. 2d 863.

While the Court of Appeals for the Second Circuit has not as yet taken a definitive position on these questions,

it presently has under consideration six appeals involving the right to counsel which Chief Judge Lumbard directed consolidated and reconsidered *en banc*.

On a basic constitutional issue such as this, involving one of the most vital safeguards guaranteed any accused, the courts of this land should speak with one voice—that of this Court. That only a further statement by this Court can end the present discord is indicated by the shocking action of Chief Justice Weintraub in directing all judges and county prosecutors in the State of New Jersey to disregard the decision of the Court of Appeals for the Third Circuit in the *Russo* case (N.Y. Times, 6/9/65, p. 1, col. 1).

In the case at bar, the court below chose not to pass upon the novel constitutional question presented, namely, the "applicability to grand jury proceedings of *Escobedo* v. *Illinois*, 378 U.S. 478". Additionally, it would not decide "whether, in the circumstances of this case, Winter had become an 'accused' in the *Escobedo* sense." This, we are at a loss to understand.

Once the Government's investigation is no longer general in nature, but has focused upon a particular person, that individual is "an 'accused' in the *Escobedo* sense". This, clearly, petitioner was. At the outset of his interrogation before the grand jury, the foreman advised him that "you are a prospective defendant" and that the grand jury "is inquiring into, among other things, your conduct" (A31a).

The court was, therefore, squarely presented with the question of whether an accused is entitled to be advised of his right to counsel prior to interrogation designed to elicit incriminating statements, whatever form the inter-

rogation might take. If, as we have urged, the Assistant United States Attorney was constitutionally prohibited from interrogating petitioner in his office without first advising him of his right to counsel, then he should not be permitted to circumvent this prohibition through his use of the grand jury. Such tactics, if deemed permissible, would nullify the force and effect of this Court's decisions safeguarding the right to counsel.

A review of the instant case will enable this Court to decide these questions which the court below left unanswered. The issues involved are of too great importance to be left in doubt, and the division of authority throughout the country bears witness to the fact that, left alone, the lower courts are incapable of arriving at a satisfactory solution. Indeed, they realize that they must "await further enlightenment whether, once the right to counsel has attached, all further investigatorial activity involving some cooperation by the defendant must be with counsel's consent or at least on notice to him" (*United States ex rel. Stovall* v. *Denno*, F. 2d , 33 U.S.L.W. 2519).

2. In its opinion, the court below indicated that, if confronted with the question, it would hold that "testimony compelled from a grand jury witness who has been denied his right to counsel may not be used to secure his indictment or conviction either for the crimes being investigated or for those revealed during the course of his testimony." We submit that this does not go far enough. That for the right to counsel to have meaningful effect, the Government should be absolutely prohibited from using against an uncounseled accused, in any manner, any statement elicited during ex parte interrogation.

In holding that a prospective defendant, who has not been advised of his right to counsel, may nevertheless be prosecuted for perjury if he makes a false statement during his interrogation before the grand jury, the court below has made an untenable distinction. Had petitioner been advised of his rights and consulted with counsel, he undoubtedly would not have "perjured himself in the grand jury room". As this Court is well aware, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances" (*Escobedo* v. *Illinois*, 378 U.S. 478, 488). We can be equally certain that counsel would have advised petitioner to assert his Fifth Amendment rights and answer no questions before the grand jury. In any event, we can be sure that counsel, as an officer of the court, would have told petitioner not to lie.

Moreover, "though counsel could not have gone before the grand jury with [petitioner] he could have given him valuable advice in advance as to what questions, if any, he should answer when he was taken there" (*Jones* v. *United States*, 342 F. 2d 863, 871, dissenting opinion).

A conviction should not be permitted to stand when, as in the case at bar, it cannot be said with any degree of certainty that the Government's failure to advise the defendant of his constitutional rights did not contribute to his commission of the crime.

The question of constitutional law presented is a substantial and novel one. The authorities relied upon by the court below in support of its decision all antedate *Escobedo* and, as the court itself recognized, "recent constitutional developments" have, at the very least, cast a cloud

of uncertainty over their continuing validity. That cloud should be dispelled by an opinion of this Court.

3. There is a "serious question whether our jurisprudence, fortified by constitutional declaration permits" the Government to summon before a grand jury, and there interrogate in advance of trial, a person against whom an indictment is being sought (*Powell* v. *United States*, 226 F. 2d 269, 274). A review of the instant case would enable this Court to resolve this important question, as to which, at present, there is a conflict of authority.

Since a proceeding before a grand jury is a "criminal case" within the meaning of the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself" (*Counselman* v. *Hitchcock*, 142 U.S. 547), it has long been the settled law of the State of New York that it is a violation of a prospective defendant's constitutional rights to require him to attend before a grand jury and take an oath (*People* v. *Laino*, 10 N.Y. 2d 161, 170-171, 218 N.Y.S. 2d 647; *People* v. *Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133, 135-136). Accordingly, "an indictment obtained against him in that way would be invalid, and he could not be convicted of perjury for the testimony which he gave, inasmuch as the oath could not be legally administered to him" (*People* v. *Gillette, supra*). The fatal defect resulting from the violation of the prospective defendant's rights attaches not only to the indictment charging a substantive crime, but also to any indictment or citation for perjury or contempt (*People* v. *Laino, supra*).

This rule, which petitioner unsuccessfully urged the court below to adopt, is not without precedents in the Fed-

eral courts (see, *e.g., United States* v. *Kimball,* 117 Fed. 156; *United States* v. *Edgerton,* 80 Fed. 374; *United States* v. *Lawn,* 115 F. Supp. 674, app. dism. sub. nom. *United States* v. *Roth,* 208 F. 2d 467; see also, *Jones* v. *United States,* 342 F. 2d 863, 867-870, 873, dissenting opinion).

Rejecting the New York rule, the court below chose to follow its earlier decisions (*e.g., United States* v. *Cleary,* 265 F. 2d 459 cert. den. 360 U.S. 936) sanctioning the Government's conduct. It recognized, however, that "recent constitutional developments" may have "drawn into question particular language or authorities cited in these decisions."

We submit that more than mere language has been called into question. These earlier decisions should no longer be deemed controlling and should be declared to have no further validity. They were based upon the now discredited premise that "neither Federal agents nor prosecutors are broadly proscribed from questioning an accused in noncoercive situations", and that questioning an accused in the absence of counsel or before a grand jury is not "in itself an unduly coercive situation" (*United States* v. *Cleary, supra,* 265 F. 2d at 461-463). Thus, the court in *Cleary* placed great reliance upon its prior decision in *United States* v. *Wilson,* 264 F. 2d 104, 106, where it had affirmed a conviction, stating:

> "The stretch of the constitutional language for which the appellant contends could only be justified upon the hypothesis that there lurks in such situations [questioning in the absence of counsel] an evil analogous to the evil of compelled testimony at which the constitutional provision [Fifth Amendment]

> is expressly aimed, and that the protection of the constitution ought to be extended by generous interpretation, to strike down the comparable evil."

There can no longer be any question about the fact that incriminating statements obtained from an accused interrogation in the absence of counsel, wherever that interrogation may take place, are inadmissible as the product of testimonial compulsion (*People* v. *DiBiasi*, 7 N.Y. 2d 544, 200 N.Y.S. 2d 21; *People* v. *Waterman*, 9 N.Y. 2d 561, 216 N.Y.S. 2d 70; *People* v. *Meyer*, 11 N.Y. 2d 162, 227 N.Y.S. 2d 427; *People* v. *Donovan*, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841). The New York exclusionary rule, established by the foregoing cases, was elevated to constitutional status by this Court's decisions in *Massiah* v. *United States*, 377 U.S. 201 and *Escobedo* v. *Illinois*, *supra*. The analogy and hypothesis which the court below was not disposed to accept at the time of its decisions in *Wilson* and *Cleary*, and which it again rejected in the instant case, have since been adopted as the law of the land.

Moreover, apart from the constitutional violation involved, the Government's conduct in the case at bar is completely at odds with our traditional concepts of fundamental fairness.

The prosecutor knew that whichever way petitioner answered the questions put to him during his interrogation before the grand jury, it would result in his indictment. If petitioner admitted the receipt of money from the builders who had already given testimony against him, it would insure his indictment for bribery and would assist the Government in obtaining his conviction. On the other hand,

if he persisted in his denial thereof, a perjury indictment would be returned. Only by asserting his Fifth Amendment rights and remaining silent could petitioner have avoided this trap—and that is precisely what counsel would have advised.

From the foregoing, the prosecutor's "purpose to get him indicted for perjury . . . is manifest beyond all reasonable doubt" (*Brown* v. *United States*, 245 F. 2d 549, 555), and, under these circumstances, if "the defendant commits perjury, it can strongly be argued that the evidence is tainted since it has been induced by the Government" (*United States* v. *Thayer*, 214 F. Supp. 929, 932). The "investigating agency cannot be allowed to 'zero-in', so to speak, on the witness without advising him that if he persists, he will be prosecuted for perjury. An indictment charging an offense which is entirely the work product of the Government cannot be upheld" (*Id.*, at p. 933). Extracting testimony with a view toward a perjury prosecution is not a legitimate function of the grand jury (*Brown* v. *United States, supra; United States* v. *Icardi*, 140 F. Supp. 383, 388).

The question presented is a novel one, and since the tactics employed by the Government in the case at bar are not uncommon, a definitive statement by this Court as to their legality is urgently needed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

JEROME LEWIS
THOMAS R. NEWMAN
Of Counsel

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 504—September Term, 1964.

(Argued June 3, 1965 Decided July 2, 1965.)

Docket No. 29608

UNITED STATES OF AMERICA,

Appellee,

—against—

HYMAN WINTER,

Appellant.

Before:

MOORE and ANDERSON, *Circuit Judges,* and WEINFELD, *District Judge.**

Appeal from a judgment of conviction for violation of 18 U.S.C. §1621, the perjury statute, entered in the United States District Court for the Eastern District of New York, Zavatt, *C.J.*, after a trial before a jury.

Affirmed.

JEROME C. DITORE, Assistant United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York), *for appellee.*

* Sitting by designation.

JEROME LEWIS, Brooklyn, New York (Thomas R. Newman, Brooklyn, New York, of counsel), *for appellant.*

WEINFELD, *District Judge*:

Hyman Winter appeals from a judgment of conviction entered upon the verdict of a jury which found him guilty of perjuring himself while testifying under oath before a Federal grand jury.[1] He was sentenced to ninety days imprisonment and placed on probation for a period of twenty-one months. He seeks reversal of the conviction and dismissal of the indictment on the grounds that: (1) his testimony before the grand jury, having been compelled under a subpoena when he was a subject of inquiry, was obtained in violation of his constitutional rights to counsel and against self-incrimination; (2) even if the Government's conduct in summoning him before the grand jury did not invade his constitutional rights, it was so unfair as to warrant invocation of this Court's supervisory power over the administration of criminal justice; and (3) the question which he was convicted of answering falsely was not material to the grand jury inquiry and hence furnished no basis for a perjury prosecution.

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[1] 18 U. S. C. §1621 provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury . . ."

The appellant was a construction supervisor in the service of the Federal Housing Administration. In December 1962 a grand jury in the Eastern District began an extensive investigation into bribery, graft, extortion and other corrupt practices allegedly involving FHA employees and local builders. During the course of the inquiry approximately 100 witnesses, most of them builders and FHA personnel, had been called before the grand jury. Fifty of the builders testified they knew appellant and all but six denied they had ever given him money. These six witnesses granted that payments were made by them to Winter, although some said these were not to influence his official action, but were more in the nature of gratuities. It was after these witnesses had testified that appellant was subpoenaed.

Winter first appeared before the Assistant United States Attorney in charge of the inquiry, who informed him that he was a subject of the grand jury investigation, advised him of his right against self-incrimination, and presented him with a "waiver of immunity" which he acknowledged he understood and agreed to execute. When the Assistant asked whether he had accepted bribes from builders, Winter vehemently denied he had ever taken "a crooked penny in my life." He then went before the grand jury, as Winter himself testified, "to answer questions about myself and about bribes." The foreman advised him that he was the "subject of an investigation" into his "conduct" as an employee of the FHA and that:

> "I wish to further advise you that you are a prospective defendant, and that anything that you might say before the Grand Jury could be used against you at a

> later proceeding or proceedings. . . . You need not testify as to those matters which may tend to incriminate you, that is to say, you cannot be compelled to testify against yourself, as provided in the Fifth Amendment to the United States Constitution. . . . That is not to say, however, that you cannot testify before the Federal Grand Jury if you desire to do so. . . . Nor is it to say that you can refuse to testify as to matters that would incriminate others than yourself. . . . But, as I have already stated to you, if the matters you would testify to would tend to incriminate yourself as well as others, you can refuse to testify and can assert your rights under the Fifth Amendment."

Indicating that he understood the foregoing advice and the nature of a "waiver of immunity" which he was again asked to execute, he signed the "waiver."

Appellant then testified, at no time asserting his privilege against self-incrimination. He was shown a list of the fifty builders who had testified they knew him, which included the six who swore they had given him money at various times. He was asked whether he knew what a "gratuity" was and responded it was "some sort of tip or gift . . . anything that has value," including money and liquor. He denied that he had ever accepted gratuities from anyone on the list or from any other builder. He also denied he had received money from a builder for the purpose of influencing his official decisions or actions. He was then questioned as to whether any builder on the list "did dislike you or have any grievance against you to the extent that he would bear false witness against you," or "would testify falsely against you or against any other Federal employee." He responded that, except for one Richard Wallen, who had

previously complained to Winter's superiors about "shakedowns," no builder had such a motive and none had ever threatened to "fix him." Winter specifically denied receiving a case of twenty-five year old Scotch whisky or $100 per week from any builder, or borrowing from or lending to anyone in the industry. He asserted ignorance of any arrangement whereby FHA inspectors allegedly extorted a set fee for each stage of the inspection process.

Finally, he was asked the question which formed the basis for the fifth count, the only one submitted to the jury[2]—"Is it your testimony, then, that you have never taken money at any time from any builder for any reason whatsoever?" Winter replied, "That is correct, sir."

Six weeks after Winter's testimony and nearly seven months after commencement of the inquiry, the grand jury returned bribery indictments against nine or ten FHA employees, including Winter, and perjury indictments against Winter and Richard Wallen, the builder who had once accused Winter, but then sought to retract the charge.[3] With respect to Winter the Government chose to proceed to trial on the perjury indictment, obtaining the conviction which forms the basis of this appeal.

I

It is beyond question that appellant was fully and adequately advised of his right against self-incrimination. But

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[2] Counts 2, 3 and 4 were dismissed as duplicitous at the end of the Government's case and count 1 was dismissed at the end of the entire case.

[3] Wallen, who later testified at the trial against Winter, pleaded guilty to perjury in 1964.

the record does not indicate that he was advised, either by the Assistant United States Attorney or by the grand jury, of a right to counsel. Appellant contends that inasmuch as he was already a "prospective" or "de facto" defendant[4] when he was subpoenaed to appear before the grand jury, his testimony was procured not only in violation of his Sixth Amendment right to counsel, but also in violation of his Fifth Amendment right against self-incrimination, notwithstanding that he was fully advised of the latter. Testimony so elicited, the argument runs, cannot be used as a predicate for a perjury indictment, even if the witnesses uttered perjurious statements.

Short shrift may be made of appellant's claim that the self-incrimination clause of the Fifth Amendment prohibits the Government from ever summoning before a grand jury one who has become a target of inquiry and is a "potential" defendant. Whatever may be the rule in the State of New York,[5] the Fifth Amendment does not proscribe the

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[4] Counsel for appellant uses the terms interchangeably, although "de facto" implies that the return of an indictment is but a mere formality, while "potential" suggests that the decision to prosecute has not yet been made. In any event, little turns on the choice of words.

[5] See *People* v. *Laino*, 10 N. Y. 2d 161, 218 N. Y. S. 2d 647 (1961), where it was held the State cannot indict "a target of a grand jury investigation" for past crimes revealed during testimony given in response to a grand jury subpoena. See also, *People* v. *Steuding*, 6 N. Y. 2d 214, 217, 189 N. Y. S. 2d 166, 167 (1959) ("it is solely the Constitution of New York with which we are now concerned"); *People* v. *De Feo*, 308 N. Y. 595 (1955); *People* v. *Ferola*, 215 N. Y. 285 (1915) (coroner's inquest). Closest to the present case is *People* v. *Gillette*, 126 App. Div. 665, 111 N. Y. Supp. 133 (1st Dep't 1908), where two of five judges, in an alternative holding, concluded that a potential defendant could not commit perjury before a grand jury which had subpoenaed him "inasmuch as the oath could not be legally administered to him."

practice here inveighed against. Repeatedly this Court has so ruled,[6] declining to equate the position of a "potential" defendant called before a grand jury with that of one already on trial. Whether or not recent constitutional developments have drawn into question particular language or authorities cited in these decisions[7] their basic force remains unimpaired.

To suggest that once an individual is named by witnesses before a grand jury under circumstances which may lead to his indictment he thereby automatically gains immunity from subpoena would denude that ancient body[8] of a substantial right of inquiry. This grand jury was engaged in

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[6] E.g., *United States* v. *Pappadio*, —— F. 2d —— (2d Cir. 1965); *United States* v. *Cleary*, 265 F. 2d 459 (2d Cir.), cert. denied, 360 U. S. 936 (1959); *United States* v. *Garnes*, 258 F. 2d 530, 534 (2d Cir. 1958), cert. denied, 359 U.S. 937 (1959); *United States* v. *Klein*, 247 F. 2d 908, 920-21 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958); *United States* v. *Scully*, 225 F. 2d 113 (2d Cir.), cert. denied, 350 U. S. 897 (1955); *United States* v. *Benjamin*, 120 F. 2d 521 (2d Cir. 1941). See *United States* v. *Grunewald*, 233 F. 2d 556, 568-71 (2d Cir. 1956), rev'd on other grounds, 353 U. S. 391, 415-24 (1957) (the Halperin counts). Cf. *Malloy* v. *Hogan*, 378 U.S. 1, 11-14 (1964) (by implication). Contra, *Piemonte* v. *United States*, 367 U. S. 556, 565-66 (1961) (dissenting opinion).

[7] See, e.g., the statement in *United States* v. *Cleary*, 265 F. 2d at 461, that "Neither federal agents nor prosecutors are broadly proscribed from questioning an accused in noncoercive situations" and its accompanying citation of *United States* v. *Wilson*, 264 F. 2d 104 (2d Cir. 1959), in light of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

[8] Sometimes referred to as "a law enforcement agency," *United States* v. *Cleary*, 265 F. 2d at 461, and elsewhere as an "arm of the Court," *Levine* v. *United States*, 362 U. S. 610, 617 (1960). See also, *Brown* v. *United States*, 359 U. S. 41, 49 (1959); *Cobbledick* v. *United States*, 309 U. S. 323, 327 (1940); *Blair* v. *United States*, 250 U. S. 273, 279-83 (1919); *Hale* v. *Henkel*, 201 U. S. 43, 61-66 (1906); *In re Black*, 47 F. 2d 542, 544 (2d Cir. 1931).

a broad investigation of alleged bribery and corruption of FHA officials. It had the right, and indeed the duty, to follow leads wherever they pointed, to determine whether bribery and other illegal practices had been engaged in and, if so, what builders and officials were involved and how far up the official ladder the alleged wrongdoing extended. It had a legitimate interest in summoning Winter before it. Moreover, it was not bound to accept at face value the testimony of the six builders and other previous witnesses, and the evidence indicates that when Winter was subpoenaed it had not yet decided to indict. As the foreman testified, the jurors wanted to "Let him [Winter] answer and find out whether it was true or not." Winter well might have persuaded the grand jury of his truthfulness or that the testimony of the six builders furnished an inadequate basis upon which to return a True Bill. On the other hand, denying the grand jury the right to call Winter would not have prevented his indictment and could only have hampered the inquiry into wrongdoing, if any, of others. The grand jury was entitled to his testimony subject, of course, to his right not to incriminate himself.[9]

In short, and leaving aside the questions whether a "potential" defendant must be advised of his status and of his right not to incriminate himself, questions not presented on the facts of this case,[10] appellant's right under the self-

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[9] See *Hale* v. *Henkel*, 201 U. S. 43, 69-70 (1906).

[10] Compare *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y.), appeal dismissed *sub nom. United States* v. *Roth*, 208 F. 2d 467 (1953) (witness, already the subject of an information, subpoenaed and not advised of right not to testify); *United States* v. *Edgerton*, 80 Fed. 374 (D. Mont. 1897) (witness not advised that it was his conduct the grand jury was investigating). See also, *United States* v. *Hoffa*, 156 F. Supp. 495, 514 (S. D. N. Y. 1957).

incrimination clause of the Fifth Amendment was not violated when he was summoned to appear before the grand jury.

No more successful is appellant's Sixth Amendment claim, which arises out of the omission of the Assistant United States Attorney to advise him of his "right" to consult with counsel before entering the grand jury room. In reaching this conclusion, we do not pass upon the applicability to grand jury proceedings of *Escobedo* v. *Illinois*,[11] nor do we decide whether, in the circumstances of this case, Winter had become an "accused" in the *Escobedo* sense. We hold, instead, that even if appellant were entitled, as a matter of constitutional right, to be advised that he could consult with counsel prior to testifying before the grand jury, omission so to advise him is no defense to a charge that he thereafter perjured himself in the grand jury room. For this position we find both reason and authority.

It is one thing to say that testimony compelled from a grand jury witness who has been denied his right to counsel may not be used to secure his indictment or conviction either for the crimes being investigated or for those revealed during the course of his testimony. Exclusion of such testimony does not preclude reindictment and prosecution on the basis of untainted evidence, thus affording an

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[11] 378 U. S. 478 (1964). In this connection see Enker & Elsen, "Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*," 49 Minn. L. Rev. 47, 73-76 (1964). Some of the differences between stationhouse interrogation and the taking of grand jury testimony are set out in *In re Groban*, 352 U. S. 330, 337-48 (1957) (dissenting opinion).

opportunity to vindicate the public interest.[12] It is an entirely different proposition, however, to say that such a witness may with absolute impunity proceed to perjure himself in the hope of avoiding the return of a True Bill. Such a rule would degrade the oath and have the effect of conferring permanent immunity on the perjurer.

There are decisions in point. The Courts of Appeals for the Fifth and Seventh Circuits[13] have held that a "prospective" defendant not informed of his right against self-incrimination could nevertheless be prosecuted for false testimony thereafter given a grand jury. And this Court, in *United States* v. *Remington*,[14] held that one who commits perjury upon the trial of an indictment subsequently invalidated because of grand jury misconduct, nevertheless is subject to prosecution. The Court said:

> "Here we have a separate crime of perjury committed after the illegal conduct by the government as opposed to the above cases [Nardone v. United States, 308 U.S. 338 (1939), and Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920)] where we had only a rule of evidence developed to prevent the government from making use of its illegally procured knowledge. It seems to us an unwarranted extension of that doctrine to apply it here to a new wrong com-

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[12] This possibility of reindictment and prosecution was noted and relied upon by the New York Court of Appeals in *People* v. *Laino*, 10 N. Y. 2d 161, 173, 218 N. Y. S. 2d 647, 657 (1961). Indeed, the successful appellant in *People* v. *Steuding*, 6 N. Y. 2d 214, 189 N. Y. S. 2d 166 (1959), was reindicted and convicted, see *People* v. *Laino, supra*, 10 N. Y. 2d at 173, 218 N. Y. S. 2d at 657.

[13] *United States* v. *Orta*, 253 F. 2d 312 (5th Cir.), cert. denied, 357 U. S. 905 (1958); *United States* v. *Parker*, 244 F. 2d 943 (7th Cir.), cert. denied, 355 U. S. 836 (1957).

[14] 208 F. 2d 567 (2d Cir. 1953), cert. denied, 347 U. S. 913 (1954).

> mitted by the defendant. Moreover, to call the perjury a fruit of the government's conduct here, is to assume that a defendant will perjure himself in his defense. . . . If this assumption is a premise of the defendant's argument, we cannot accept it for it involves disregard of the defendant's oath and an assumption that perjury, although a crime, is an inevitable occurrence in judicial proceedings. . . . [S]upervisory rules . . . do not permit the defendant to commit a new and independent crime. We do not preserve justice by allowing further criminal activity to take place."

In *Remington* the Court relied upon the Supreme Court's decision in *United States* v. *Williams*,[15] upholding a conviction for perjury committed during the course of a trial on an indictment later determined to state no federal offense. The Supreme Court rejected the view that the invalidity of the indictment rendered the trial court incompetent to administer a binding oath or deprived it of "jurisdiction." It took the position, as we do here, that a prior error on the part of the government was no defense to a charge under a "federal statute enacted in an effort to keep the course of justice free from the pollution of perjury."[16]

United States v. *Haas*[17] presented somewhat similar issues when defendants were called before a grand jury engaged in investigating income tax violations and conspiracy.

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[15] 341 U. S. 58 (1951). Cf. *Ogden* v. *United States*, 303 F. 2d 724, 731 (9th Cir. 1962) (18 U. S. C. §1001), cert. denied, 376 U. S. 973 (1964).

[16] 341 U. S. at 68.

[17] 126 F. Supp. 817, 818 (S. D. N. Y. 1954), where, however, the defendants, although not advised of their right against self-incrimination, did have the benefit of counsel.

As a result of their grand jury testimony under subpoena they were indicated for perjury. The writer of this opinion stated:

> "There, Haas, although subpoenaed as a witness, was clearly a prospective defendant by reason of past acts. Here, his prosecution could result only from a perjurious statement not in existence at the time he had been subpoenaed before the Grand Jury. He could only become a defendant by reason of his conduct before the Grand Jury."

The cases cited by appellant are inapposite, since they were based on testimony elicited by tribunals without jurisdiction to conduct the inquiry in issue[18] or involved deliberate efforts to entrap witnesses into committing perjury.[19] Here, as in *Williams* and *Remington*, the grand jury was a competent body to inquire into bribery and corruption of Federal officials and to administer an oath, and was not used to entrap. In summary, we hold that failure to inform a "potential" defendant of a right to counsel, assuming such a right exists, does not establish a defense to a charge that he thereafter gave false testimony while under oath in response to a material question directed to him by a competent tribunal.

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[18] See, e.g., *Brown* v. *United States*, 245 F. 2d 549 (8th Cir. 1957) (alternative holding), where a Nebraska grand jury questioned defendant with respect to crimes allegedly committed in another jurisdiction, and *United States* v. *Icardi*, 140 F. Supp. 383 (D. D. C. 1956) (alternative holding), where a Congressional committee was held to have exceeded any legitimate legislative purpose. But see *United States* v. *Neff*, 212 F. 2d 297, 302 (3d Cir. 1954) (ignoring lack of venue).

[19] Compare *Brown* v. *United States*, *supra*, and *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963), with *LaRocca* v. *United States*, 337 F. 2d 39, 42-43 (8th Cir. 1964).

II

Appellant next contends that in the circumstances here presented it was unfair for the Government to have subpoenaed him as a grand jury witness. The essence of his argument is that since the grand jury already had evidence of payments to Winter, service of the subpoena impaled him on the horns of a trilemma: (1) to admit receipt of the payments, thereby incriminating himself, or (2) to assert his privilege against self-incrimination, thereby prejudicing his cause before the grand jury, or (3) to deny the payments, thereby running the risk of a perjury charge. Finally, he urges that, having placed him in this position, it was unfair for the prosecutor not to warn him to the prior grand jury testimony and not to advise him that a continued denial of the testimony would invite a perjury charge. As to this latter contention, there is no duty upon the prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury—indeed it would appear that the Federal rules prohibit such disclosure.[20] An oath to tell the truth as one knows it is not conditioned upon what others may have testified. "[P]erjury is as highly a personalized crime as exists upon the statute books. The response of [one] sworn to give true testimony is personal in every sense of the word."[21] It is the belief of the individual in the verity of

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[20] Fed. R. Crim. P. 6(e). See *Hale* v. *Henkel,* 201 U. S. 43, 59 (1906).

[21] *United States* v. *Charnay,* 211 F. Supp. 904, 906 (S. D. N. Y. 1962).

his sworn testimony that is crucial.[22] And neither was there any duty upon the prosecutor to caution a witness to testify truthfully. Once a witness swears to give truthful answers, there is no requirement to "warn him not to commit perjury, or conversely to direct him to tell the truth."[23] It would render the sanctity of the oath quite meaningless to require admonition to adhere to it. In any event, while there was no legal duty to warn him against committing perjury, Winter was put on notice that previous witnesses had given testimony involving him. The questions whether he knew of any builder who bore him ill will or who had a motive to give false testimony against him clearly indicated that previous witnesses had not given him a clean bill of health. And finally he conceded that before entering the grand jury room he was warned, "Whatever you do, don't lie." As far as the Hobson's choice which he claims was forced upon him by his appearance before the grand jury, the short answer is that if the truth were incriminatory, it was his right to refuse to reveal it. Instead, having chosen to tell his story which the grand jury rejected and a petit jury found false, he cannot now complain of his failure to assert his privilege. As to the contention that had he availed himself of the privilege it would have prejudiced his cause before the grand jury just as much as if he admitted wrongdoing, this is overbalanced by the grand jury's legitimate interest in pursuing its broad investigation. This is not a case where the inquiry was

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[22] 18 U. S. C. §1621: "Whoever, having taken an oath before a competent tribunal, . . . that he will testify . . . truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . ."

[23] *United States* v. *Haas*, 126 F. Supp. 817, 818 (S. D. N. Y. 1954), and cases there cited.

directed to a single defendant "for the sole and dominating purpose of preparing an already pending indictment for trial."[24] Moreover, without conceding the validity of his view that the assertion of his constitutional right would have prejudiced him before the grand jury, the fact is that had he done so and notwithstanding been indicted for bribery, the assertion of the right could not have been used against him upon the trial.[25] There is no basis for the charge that the prosecution engaged in any conduct which contributed to his testifying falsely.

III

Appellant's final contention is that his testimony was not material because as a matter of fact it could not impede the course of the grand jury's investigation, that body having made its decision to indict regardless of his testimony. To state appellant's position is to refute it. Not only do the facts not support his claim, for the evidence indicates that the grand jury had kept an open mind pending his appearance, but he misconstrues the nature of the legal test. Materiality turns not on the open-mindedness of the inquiring body, but on the testimony's potential—viewed as a matter of law to be decided by the trial court[26]—for affecting the course of inquiry. In light of the broad sweep of this grand jury's investigation into alleged bribery and corruption involving builders and officials, his testimony was clearly material.

The conviction is affirmed.

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[24] *United States* v. *Dardi*, 330 F. 2d 316, 336 (2d Cir.), cert. denied, 379 U. S. 845 (1964).

[25] *United States* v. *Grunewald*, 353 U. S. 391, 418-24 (1957).

[26] *United States* v. *Marchisio*, 344 F. 2d 653, 665 (2d Cir. 1965).

APPENDIX B

Decision of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

HYMAN WINTER,

Appellant.

Before:

MOORE and ANDERSON, *U.S.C.J.J.*,
WEINFELD, *U.S.D.J.*

PETITION FOR REHEARING AND STAY OF MANDATE

Petition for rehearing denied. Motion for stay of mandate granted subject to provisions of Rule 28(c).

LPM
RPA
U.S.C.J.J.
EW
U.S.D.J.

August 2, 1965.